BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-115
Telecommunications Act of 1996:	)	
	)	
Telecommunications Carriers' Use	)	
of Customer Proprietary Network	)	
Information and Other	)	
Customer Information	)	
	)	
Implementation of the Non-Accounting	)	CC Docket No. 96-149
Safeguards of Sections 271 and 272	)	
of the Communications Act of 1934,	)	
as Amended	)	
	)	

COMMENTS OF SBC COMMUNICATION INC. ON PETITIONS FOR RECONSIDERATION OF THE CPNI ORDER, AND ALTERNATIVE PETITION FOR FORBEARANCE OF SBC COMMUNICATIONS INC.

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SUMMARY*

SBC urges the Commission to reconsider or, in the alternative, to forbear from applying, its CPNI Order in several respects. Specifically, SBC demonstrates herein that:

Section I -- The Commission should reconsider and rescind, or forbear from applying, Rule 64.2005(b)(1) with respect to CMRS providers. By deciding not to apply this rule to CMRS providers, the Commission's actions with regard to CPNI would be consistent with its historical regulation of and the competitive nature of the wireless industry, customers' expectations, and the longstanding Commission-sanctioned marketing practices of CMRS carriers.

Section II -- The Commission should reconsider and rescind, or forbear from applying, Rule 64.2005(b)(1) with respect to wireline CPE and voice mail-related services. The PFRs and GTE Petition/CTI Request proceedings provide a host of worthwhile reasons why, in deference to customers' expectations and desires spurred by the elimination of structural separation in the CPE and enhanced/information services markets, Section 222(c)(1)(B) should encompass the offering, installation, maintenance and repair of CPE and voice mail-related services. Consequently, wireline carriers should not be subjected to Rule 64.2005(b)(1) in these contexts. Should it fail to conclude otherwise, the Commission will only have created additional inconsistencies with the foundations of its own CPNI Order.

Section III -- The Commission should not upset its decision to decline applying the general nondiscrimination requirements of Section 272 to the use and/or disclosure of CPNI in

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* All abbreviations used herein are referenced within the text.

appropriate circumstances pursuant to Section 222. MCI's and Comptel's proposals lack all sense of balance and proportion, elevating competitive concerns over privacy and customer convenience concerns. Their approach, if adopted, would only succeed in gutting the careful balance by Congress and the Commission of multiple considerations that represent the hallmark of Section 222.

Section IV -- The electronic audit requirement should be eliminated in its entirety. Virtually every party filing a PFR demonstrates that its costs would far outweigh any benefits, particularly given that the new electronic records that would have to be created would touch extensive and far-flung transactions-driven operations having nothing to do with either the marketing or sale of services or products.

Section V -- The prohibition on use of CPNI for winback and retention purposes constitutes poor public policy, and Rule 64.2005(b)(3) should be eliminated entirely. Multiple briefs have now been filed in connection with this subject and it is clear that: first, meaningful winback programs simply do not work without access to a customer's CPNI; and second, that winback offers and counter-offers are procompetitive, within the parameters of the customer-carrier total service relationship, and greatly benefit consumers. Further, because Section 222 applies to every carrier, the Commission should not accept the red herring argument advanced by some, to the effect that ILEC use of CPNI for winback or retention purposes should be barred as a violation of Section 222(b). The premises relied upon by these commenters are utterly false in every respect, confusing CPNI with carrier information.

Section VI -- The highly specific and Miranda-like requirements of Rule 64.2007(f)(2) have no place in securing customer approval to use their CPNI during an inbound call pursuant to

Section 222(d)(3), and the Commission should so clarify as GTE requests. Such requirements would inconvenience and frustrate the carrier-customer dialogue and clog carriers' incoming call channels, thus creating severe "accessibility" difficulties to customers. Nothing in the CPNI Order or rules suggests that the Commission intended such results.

Section VII -- Written notifications should be plain and understandable. Rigid application of the notification requirements as presently written is neither necessary nor appropriate given the changing telecommunications environment and customers' privacy expectations. Finally, approval should be obtainable by either written or oral means following written notification of CPNI rights within customers' bills.

SBC emphasizes that, in its view, taking these steps would provide very significant consumer and industry benefits, and would also ease Commission oversight burdens regarding compliance with its CPNI Order.

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COMMENTS OF SBC COMMUNICATION INC. ON PETITIONS FOR RECONSIDERATION OF THE CPNI ORDER, AND ALTERNATIVE PETITION FOR FORBEARANCE OF SBC COMMUNICATIONS INC.

SBC Communications Inc. ("SBC"),[1] on behalf of itself and its subsidiaries, hereby files these comments regarding the various petitions for reconsiderations (PFRs") filed in connection with the Commission's February, 1998, CPNI Order.[2] In addition, SBC supports the petitions for forbearance filed by Bell Atlantic, GTE, CommNet and PrimeCo,[3] and specifically requests that any relief extended to these parties likewise be extended to SBC and all similarly situated entities. In a similar regard, to the extent that the Commission has not ruled on SBC's earlier-

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[1]This pleading refers to the parties by the abbreviations used by them in their own PFRs.

[2]Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 95-115, Second Report and Order, released February 26, 1998, DA 98-27 ("CPNI Order").

[3]Bell Atlantic, at 9-22; GTE, at 12-15, 18-21, 24-26, 30-32; CommNet, at 4-10; PrimeCo, at 11-16.

filed petition for temporary forbearance.[4] SBC hereby formally petitions for complete forbearance on the same grounds,[5] as well as those stated herein.

I. THE COMMISSION SHOULD RECONSIDER AND RESCIND, OR FORBEAR FROM APPLYING, RULE 64.2005(b)(1) WITH RESPECT TO CMRS PROVIDERS.

The Petitions for Reconsideration present the Commission with many strong reasons to reconsider Rule 64.2005(b)(1) as it applies to CMRS providers.[6] The CMRS industry is extremely competitive and the Commission intentionally has minimized regulation. The Commission has found that the public interest is furthered by permitting CMRS providers to offer customers highly integrated bundled offerings to customers, complete with wireless service, handsets and "information services," such as voice mail and messaging.[7] Further, the Commission has permitted CMRS providers to make flexible use of spectrum, allowing them

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[4]Petition for Temporary Forbearance or Stay of GTE Service Corporation, and the Request for Deferral and Clarification of Cellular Telecommunications Industry Association ("GTE Petition/CTIA Request"), Comments of SBC Communications Inc. and Petition for Temporary Forbearance or Deferral of SBC Communications Inc., filed May 8, 1998. (collectively, "SBC's GTE Petition/CTIA Request Comments/Temporary Petition" or "SBC's Temporary Petition"). These comments and petition requested that relief with respect to the application of the CPNI Order and accompanying rules to (1) CPE and information services for CMRS carriers; (2) wireline carriers' voice mail services; (3) CPE used in connection with wireline carriers' Caller ID, Call Waiting and ADSL services; and (4) carrier "winback" and "retention" efforts.

[5]In support of this petition, SBC incorporates its previously-filed Temporary Petition as if fully restated herein.

[6] Comcast, at 3-5; Omnipoint, at 9-13; CTIA, at 17-24.

[7] The highly integrated nature of CMRS offerings has been extensively documented in GTE's Petition and CTIA's Request, the comments and reply comments filed in response, and the Petitions for Reconsideration filed in this docket. See also, Bundling of Cellular Customer Premises Equipment and Cellular Service 7 FCC Rcd 4028 (1992).

to offer an unlimited variety of services over their licensed frequencies.[8] As a result of long-standing practices of CMRS providers, customers fully expect them to offer integrated service offerings, tailored to meet the customers' demonstrated wireless service needs. Customers have no privacy concerns regarding their wireless carrier's own use of CPNI; rather, they expect their carrier to use such information to devise the best complete service offering for them, including wireless service, handset and information services.

Through its Clarification Order,[9] the Common Carrier Bureau intended, among other things, to provide "CPNI relief" with regard to the bundled or integrated service offerings of CMRS providers, but the order merely exacerbates existing confusion and is unworkable. If, as petitioners note, the Clarification Order allows carriers to use CPNI to provide "bundled" offerings of service, CPE, and information services only to customers that obtained their existing CPE or information service from the carrier or agent of the carrier, the absurd result would be to force the carrier to discriminate among its customers based solely on where they obtained their equipment.[10] For example, relocated individuals who bring equipment from their previous location and come on as "service-only" would be precluded from being informed of such bundled offerings. Such a rule would fly in the face of the fact that CMRS providers have information about and an ongoing relationship with the CPE of all their

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[8] Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio services, 11 FCC Rcd 8965, 8967 (1996).

[9] Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, Order, released May 21, 1998 ("Clarification Order").

[10] Comcast, at p. 8; ALLTEL, at pp. 6-7; Bell Atlantic, at 20-21; 360 Degrees, at n. 12; BellSouth, at p. 15.

customers, including those who do not actually receive the CPE from that carrier. Among other things, a carrier knows the electronic serial number of each customer's handset, the carrier has programmed the handsets and activated them on its system, and the handsets are operating under the carrier's license and the carrier is responsible for operational control over handsets.[11] In addition, many carriers: 1) do not keep track whether the customer originally obtained the handset from the carrier, one of its agents, or a third party[12] or 2) may record such information on the written contract, but do not keep such information in a manner in which it can be electronically sorted.

Petitioners have provided the Commission ample statutory basis for reconsideration of Section 64.2005(b)(1) as it applies to CMRS providers. Section 222(c)(1)(B) of the Telecommunications Act of 1996 permits a telecommunications carrier to use CPNI, without customer approval, "in its provision of . . . services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories." Petitioners have demonstrated that CPE and information services clearly are "services necessary to, or used in, the provision of" CMRS.[13] SBC urges the Commission to conclude, pursuant to the statute, that it should not apply Rule 64.2005(b)(1) to CMRS providers.[14]

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[11] 47 C.F.R. 22.297.

[12] Comcast, at 8; BellSouth at 6.

[13] Omnipoint, at 5-7; AT&T, at 7-8; Comcast, at 12-15; CTIA, at 25-31; PrimeCo, at 4-9; GTE, at 10-12; CommNet, at 2-3.

[14] If the Commission chooses not to reconsider application of Section 64.2005(b)(1) to CMRS providers, the Commission should forbear from applying this rule to them. An extensive record is before the Commission showing that such forbearance is appropriate. See, note 4, supra. Also, many parties filing Petitions for Reconsideration strongly argue that, in the absence of reconsideration, the Commission should forbear from applying this rule to CMRS providers. (See, e.g., GTE, at 12-15; CTIA, at 34-39; 360 Degrees Communications, at 3-6.)

Finally, SBC concurs with petitioners that the Commission should clarify that CMRS providers may use CPNI in connection with customer loyalty programs.[15] The provision of free goods to customers who qualify for them based on wireless usage does not constitute marketing of the goods, but rather rewarding customers for using the service that is the subject of the program. Through such loyalty programs, carriers are marketing the underlying wireless service. In addition, customers who call the carrier to redeem their points and claim their reward must be deemed to have given at least temporary CPNI approval, since they know the carrier must check their account to verify that they qualify.

II. THE COMMISSION SHOULD RECONSIDER AND RESCIND, OR FORBEAR FROM APPLYING, RULE 64.2005(b)(1) WITH RESPECT TO WIRELINE CPE AND VOICE MAIL-RELATED SERVICES.

Generally speaking, the Commission's "total service relationship" approach attempted to remain faithful to several important considerations the Commission relied on in its CPNI Order: (1) that the relationship is defined by "what customers reasonably understand their telecommunications service to include[;]"[16] (2) that customers do not "expect or desire their carrier to maintain internal divisions among the different components of their service, particularly where such CPNI use could improve the carrier's provision of the customer's existing service[;]"[17] and (3) that "customers expect that CPNI generated from their entire service will be used by their carrier to market improved service within the parameters of the customer-carrier relationship."[18] Unfortunately, as many companies have since pointed out,

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[15] Vanguard, at 15-16; Omnipoint, at 19.

[16] CPNI Order, ¶24.

[17] Id., ¶55.

[18] Id., ¶24.

and as several petitioners for reconsideration and/or forbearance now again emphasize,[19] the Commission erred by not applying these considerations to the CPE and voice mail-related services offered by wireline carriers. Instead, the Commission adopting a wooden and myopic legal analysis, and in doing so abandoned customers' legitimate expectations and desires, their understanding of the scope of their total service relationship, and the prospect that information about their entire service relationship could be used to benefit them -- without any identification by the Commission of the public policy objectives it believed necessary to achieve.

In the course of the GTE Petition/CTIA Request proceedings, the Commission was provided a host of worthwhile public policy reasons why, in deference to customers' expectations and desires spurred by the elimination of structural separation, Section 222(c)(1)(B) should encompass the offering, installation, maintenance and repair of CPE and voice mail-related services, so that wireline carriers should not be subjected to Rule 64.2005(b)(1) in these contexts. What several petitioners now emphasize is the legal means by which to get "from here to there." SBC urges the Commission to seize this opportunity.

Section 222(c)(1)(B) allows the use of CPNI in connection with "services necessary to, or used in, the provision of such telecommunications service." As SBC has noted, construction of the term "necessary" in this statute need not and should not be restrictive, particularly given that in other contexts the Commission has concluded that the same word

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[19] See, e.g., Ameritech, at 2-6; Bell Atlantic, at 3-16; BellSouth, at 5-11; GTE, at 14-26; NCTA, at 6-7; TDS, at 6-10; USTA, at 2-6.

"does not mean 'indispensable,' but rather 'used' or useful.'"[20] Consequently, Section 222(c)(1)(B) would permit use of CPNI in connection with services "useful to or used by" customers in the provision of telecommunications service, a construction which would comfortably include the offering, installation, maintenance and repair of CPE and voice mail-related services.

GTE also correctly points out that Congress' insertion of the term "necessary" (or the phrase "necessary to") immediately preceding the phrase "or used in" creates a specific context in which Congress meant the term "necessary" to be interpreted -- not in a "rigid or inflexible" matter, but rather, in a flexible manner in harmony with the context in which it was written.[21] And, SBC also agrees with BellSouth that a less restrictive reading of the statute would be "more consistent with the Commission's expressed objective of interpreting Section 222(c) in a manner that reflects customer expectations."[22]

Unless the Commission adopts an approach consistent with SBC's that would be compatible and other petitioners' proferred legal interpretation, it will have succeeded only in digging itself into a deep regulatory hole in multiple ways: (1) by arriving at one result with respect to inside wire and telephone directories, and yet a contrary result with respect to services like the offering of CPE and voice mail-related services, all without any legitimate Section 222(c)(1)(B) distinction; (2) by abandoning the interests of customers, which it so strongly relied on, indeed championed, in rejecting the so-called "discrete service" approach

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[20]SBC, at 7, citing, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499 (1996), ¶579.

[21]GTE, at 9.

[22]BellSouth, at 10.

to interpretation of Section 222(c)(1); and (3) perhaps, by appearing to create an "bundling" exception of sorts in its Clarification Order, which might be construed as conferring greater CPNI freedoms upon wireless carriers than upon wireline carriers.[23] There is no reason to avoid the path of least resistance where it is more sound from a public policy perspective, more sustainable as a legal matter, and more sensible as a business matter, than proceeding down other paths.

In addition, taking the path offered by the petitioners will make industry administration and Commission enforcement of the CPNI Order far easier. This is so because the order will become principally applicable when CPNI is sought to be used among or between the three "buckets" of telecommunications services -- local, long distance and wireless services. The current lines of demarcation separating these services are relatively clear, both to the industry and the consuming public, and customers' expectations have not

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[23]Of course, the Clarification Order is expressly directed to "carriers." It could not be directed exclusively to any specific class of carriers because "it is clear that [S]ection 222 applies to all carriers equally." CPNI Order, ¶49. Moreover, to the extent that the order intended to allow certain rights to carriers who may "bundle" telecommunications services and CPE/information services, the Clarification Order itself suggests that the term "bundling" includes instances where a particular customer has purchased CPE or information services from a carrier "in conjunction with" his or her purchase of telecommunications service, Clarification Order, ¶7, or even where the customer has purchased CPE or information services from the carrier that also provides his or her telecommunications service. Id., ¶6.

Similarly, the Commission has elsewhere defined bundling in terms more broadly than those reflected in the "separate and distinct" rule, 47 C.F.R. ¶64.702(e), and the orders cited at note 14 of the Clarification Order. See, e.g., Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, First Report and Order, 12 FCC Rcd 5361 (1997), ¶¶138-139; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act, as amended, First Report and Order, 11 FCC Rcd (1996), ¶¶277-278 (concluding that "bundling" includes offering two services/products "as a package under an integrated pricing schedule," offering them "as a single combined product," (i.e., using the same sales agent to market both products to the same customer during a single communication"), and/or advertising them "in a single advertisement").

evolved quite as quickly that all three services can be purchased from the same carrier. Moreover, taking this path will best allow the Commission to maintain its vigilance where it may be more useful -- as carriers "gain a foothold in new markets."[24] Such vigilance is not needed in either the CPE or information services markets, neither of which is new and both of which are already fully competitive.

III. THE COMMISSION'S DECISION TO REVERSE ITS PREVIOUS CONCLUSION APPLYING THE GENERAL NONDISCRIMINATION REQUIREMENTS OF SECTION 272(c)(1) TO CPNI CORRECTLY BALANCES AND GIVES EFFECT TO THE MULTIPLE CONSIDERATIONS THAT ARE THE HALLMARK OF SECTION 222.

MCI raises a plethora of arguments criticizing the Commission's conclusion that the general nondiscrimination safeguards of Section 272(c)(1) have no application to CPNI. Some rest on procedural objections, some are based on analysis of Section 272, and some seek to interpret Section 222(d)(1) in a way so as to achieve the same result through the "back door." A few others, notably CompTel, also argue that the Commission erred.

All of these arguments must be rejected. The hallmarks of Section 222 are its application to all carriers, and its careful balancing of key considerations: customer control of their private information (particularly with respect to unanticipated disclosure, such as to third parties), customer convenience (allowing continued one-stop shopping within the parameters of the total service relationship), and even-handed competition (disallowing unfettered use to assist carrier entry into new markets). MCI's and other commenters' attacks suffer from the same malady -- a lack of the balance and proportion that uniquely marks Section 222. MCI's

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[24]CPNI Order, ¶77.

and CompTel's views elevate competitive considerations over customer control and convenience, and worse, distort the statute to create an asymmetrical competitive application.

A. There Was Ample Notice of the Issue of the Application of General Nondiscrimination Requirements to CPNI.

MCI first complains that it received no notice "that the applicability of Section 272 to CPNI was still in play."[25] MCI is wrong. As the CPNI Order correctly indicates, the Further Questions Public Notice raised questions concerning the "interplay" between Sections 222 and 272, including "the meaning and scope of the nondiscrimination obligation in connection with 'information' and 'services' in [S]ections 272(c)(1) and 272(e)(2) as they relate to CPNI."[26] In short, that the ball was still in play, but MCI had already moved to the showers.

Plainly, the Commission's Further Questions indicated continuing uncertainty about whether the Commission's prior conclusion that CPNI constituted "information" within Section 272(c)(1) was appropriate as both a legal and public policy matter. Moreover, SBC and other commenters vigorously contended during the course of the Further Question proceedings that this prior conclusion was not appropriate. Indeed, this effort continued over a process of approximately eighteen months. MCI received all of the pertinent pleadings and ex parte filings (there has been no claim otherwise) and cannot now be heard to complain about an outcome over which it had every lawful means available to attempt to influence, but did not.

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[25]MCI, at 7.

[26]Order, at ¶156 & n. 555, citing, Public Notice, 12 FCC Rcd 3011 (1997) ("Further Questions").

B. The "Except As Required By Law" Clause of Section 222(c)(1) Cannot Be Used to Apply a CPNI-related Sharing Requirement Neither Permitted Nor Authorized by Section 222.

MCI argues that the introductory phrase of Section 222(c)(1) -- "Except as required by law..." -- compels application of Section 272(c)(1) to CPNI.[27] MCI's analysis invites circular reasoning. The question resolved by the Commission was whether application of Section 272 requirements to CPNI is "required by law" (i.e., required by Section 272(c)(1)) in the first instance. Having concluded in the negative, there was no occasion for the Commission to have determined that any such "extra-Section 222" legal requirements were incorporated into Section 222.

Moreover, given the detailed provisions of Section 222, such a significant linguistic leap as MCI would have the Commission make should not stem obliquely and from but a single phrase that nowhere references discrimination. Indeed, the phrase is widely recognized as simply allowing carrier disclosure of CPNI "in response to a court order"[28] and, to SBC's knowledge, has never been argued as engrafting other provisions of the Act into Section 222.

C. MCI's and CompTel's Proposals Are Flatly Inconsistent With Both Section 222 and the CPNI Order.

Distancing itself from its previously-argued but since rejected "multi-carrier approval solicitation proposal," MCI now argues that the Commission should require that where a BOC uses CPNI for long distance marketing or discloses it to its Section 272 affiliate following customer approval to do so, it should disclose the CPNI to any entity demonstrating customer approval. In addition, MCI and CompTel more broadly claim that the CPNI Order contradicts

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[27]Id., at 8.

[28]CCH Trade Regulation Reports, Number 406, February 7, 1996, at 203.

the plain language of Section 272(c)(1). Each of these arguments should be rejected for several reasons. Most importantly, none accounts for the direct conflict they would create between Sections 222 and 272(c)(1), a conflict that the CPNI Order successfully and correctly avoided, while all would upset the careful balance struck by Congress in Section 222.

First, MCI's and CompTel's views do not fairly address, much less critically analyze, the multiple grounds on which the Commission rejected MCI's original arguments. The Commission's reasoning rests upon the "total service approach" that MCI's own approach would dismantle, its reluctance to adopt a view that would have no limits (e.g., were nondiscrimination requirements applicable to the form of customer approval, they might also be applicable to solicitation for approval), its view of the advantage-neutralizing provisions of Section 222(c)(2) and, its view of the interconnection duties imposed by Section 251.[29]

In these regards, MCI's and CompTel's positions miss the point of the potential conflict between Sections 222 and 272(c)(1). That is, if BOCs must share CPNI with others when they share it with their Section 272 affiliate, customer control over their private information will be irrevocably lost, and customer convenience within the total service relationship will be sorely compromised as end users would be faced with a choice of sharing their information among everyone or no one. Moreover, MCI's and CompTel's views would gut "the regulatory symmetry Congress intended for carrier marketing activities."[30] Expectedly, MCI appears to place competitive concerns over customer privacy when it is not MCI's customer's privacy. The non-reciprocal nature of MCI's and CompTel's claims --

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[29]Order, n. 561, & ¶¶163-167.

[30]Id., ¶167.

exacting CPNI from the BOCs but nothing from IXCs. CLECs or other non-BOC ILECs -- would confer "a competitive advantage in marketing"[31] that Congress specifically declined to permit by crafting an evenhanded and "level" Section 222.

Second, there can be no comparison between Sections 272(c)(1) and 275(d) of the Act, as CompTel argues.[32] Section 275(d) bars use of information about calls made to alarm monitoring service providers by LEC marketing personnel. It is consistent with the Commission's total service approach because it confines the use of information to those who are participants in the relationship, while barring such use to others. Applying Section 272(c)(1) would work an opposite result, unleashing information to those beyond the participants in the relationship from which the CPNI derived.

Third, MCI's and CompTel's arguments ignore the fundamental question of when, if ever, a third party should be able to obtain CPNI absent a customer's "affirmative written request" made pursuant to Section 222(c)(2). MCI's vague references to Section 272 and a third party's having presumably secured "customer approval" lend nothing to resolution of this issue. To the contrary, MCI's and CompTel's sole criterion for mandated disclosure -- a BOC's use of CPNI on behalf of its Section 272 affiliate or its disclosure of CPNI to that affiliate -- invites the Commission to eviscerate the mandate of Section 222(c)(2), even apart from defeating customers' privacy and total service relationship expectations.

Finally, MCI's and CompTel's approaches are thoroughly inconsistent with other arguments raised by the BOCs but expressly not addressed by the Commission. For example,

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[31] Id.

[32] CompTel, at 6.

several companies, including SBC, have demonstrated that the use and disclosure of CPNI are both necessary and useful components of implementing a long distance marketing strategy within Section 272(g)(3), and thus are excused from Section 272(c)(1)'s general nondiscrimination requirements.[33] These arguments must be addressed to the extent that the Commission decides to entertain any argument that Section 272(c)(1) may apply to the BOCs' use or disclosure of CPNI in a long distance marketing context.

These arguments also foreclose MCI's request that the Commission require BOCs to provide other entities with any customer lists they may provide to their Section 272 affiliates.[34] While it is true that customer names and addresses are not CPNI, use of lists of such information is an integral part of -- indeed, is likely the first step of -- the overall marketing of long distance services, and thus is an activity that is encompassed within Section 272(g)(3). And, while MCI complains that acquiring such lists would enable it to overcome a "tremendous head start the BOCs enjoy" in their service territories,[35] MCI neglects to observe that it is MCI and other IXCs which have the "head start" in the long distance market, in which the BOCs have no presence (unlike those IXCs which provide local service).[36]

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[33]Id., n. 564.

[34]MCI, at 13.

[35]Id., at 13-14.

[36]It is inconsequential that MCI claims to be disadvantaged because it "does not know the identity of the local service provider for most telephone subscribers in the United States." Id., at 14. Even were this highly dubious claim true, it is more than offset by the fact that the long distance market is far more fragmented than the local service market, so that it is far less likely that BOCs know their customers' chosen long distance provider than IXCs know their customers' local service provider.

D. CPNI Is Not an Unbundled Network Element ("UNE").

MCI asks the Commission to conclude that CPNI and other (unspecified) customer information are UNEs under Section 251(c)(3) of the Act, and thus subject to the Local Competition Order.[37] There is no support for such a conclusion:[38] under no circumstances can Section 251 "trump" Section 222. Instead, in all events the interconnecting carrier seeking CPNI must secure requisite authorization of the customer for a disclosure of that customer's CPNI to that carrier.

Moreover, MCI nowhere demonstrates that the measures already taken by the Commission do not meet its unstated interconnection-related concerns. The CPNI Order states in fairly clear terms that any carrier failing to disclose a customer's service record to a competing carrier that would use it to commence service for a customer that has made a buy decision operates at its own peril under Sections 201(b), 251(c)(3) and 251(c)(4) of the Act.[39] This clear signal is all that is needed; indeed, it is all that is appropriate given the multiple circumstances that might give rise to a dispute in any given case. Notably, MCI cites no examples of misbehavior against which the Commission might judge the efficacy of MCI's proposed rule.

E. The Commission Correctly Limited the Coverage of Section 222(d)(1).

Starting again from its faulty but much-repeated emphasis on the "competitive goals of Section 222," MCI claims that the Commission erred in its interpretation of Section 222(d)(1)

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[37]MCI, at 21-22.

[38]MCI Telecommunications Corporation v. Pacific Bell, File No. E-97-18, Pacific Bell's Reply to Supplemental Brief of MCI, filed April 16, 1998, at 2-3.

[39]Order, ¶¶84, 166 & n. 316.

by limiting the application of the provision to carriers already possessing CPNI, not to carriers seeking access to it.[40] The Commission need not and should not revisit its correct conclusions in this regard.

Initially, it should be noted that while MCI cloaks its claim in terms of needing CPNI to "install" and "provide" service to customers who have selected it, MCI also emphasizes needing CPNI of customers to provide them "as is" service.[41] Nowhere does it explain how it could win business "as is" without first quoting a price predicated on the services being provided by his or her existing carrier. To quote a prices for services "as is" requires the customer's authorization to provide MCI the customer's CPNI (which MCI wishes to avoid), and it stretches credulity to believe that a customer who has sufficient trust in a new carrier to give it his or her business would not also give the carrier authorization to have the information needed on which to base a price quote. The Commission should thus have some concern that MCI's proposal may have unintended consequences that would result in unanticipated transfers of CPNI to third parties for marketing purposes, and not merely to commence service to one who has made a buy decision.

Regardless, to the extent that MCI wishes to be provided CPNI merely to install service for a customer that has determined to subscribe to MCI's services, as noted above the CPNI Order already addresses the application of Section 201(b), 251(c)(3) and 251(c)(4) in this context.[42] Consequently, there is no need for the Commission to reach a conclusion of the

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[40]MCI, at 24-29.

[41]Id., at 25.

[42]Order, ¶¶84, 166 & n. 316.

sort requested by MCI. This is particularly so given the fact that the vehicle would be the consumer privacy-oriented Section 222, rather than the competition-oriented Section 251, and the fact that the most that the Commission could conclude is that Section 222 authorizes, but does not require, what MCI requests.

Furthermore, the Commission's conclusion is surely sound as a matter of statutory construction. On its face, Section 222(d)(1) provides a grant of CPNI-related authority to a telecommunications carrier relative to "its" customer, not relative to a third party's customer who is no longer serviced by that carrier (i.e., one "won" by another carrier). Further, the statute also expressly allows the authority it confers to be exercised by the carrier "either directly or indirectly through its agents." This phrase further emphasizes the statute's application to the carrier which already has a relationship with the customer (and thus possesses the customer's CPNI), because an "agent" acts on behalf of a principal, not an unrelated third party (particularly one whose interests are adverse to those of the principal).

MCI claims that Section 222(d)(1) does not on its face limit the entities to whom the grant of CPNI authority runs. However, the same argument can be made of the inbound telemarketing exception appearing at Section 222(d)(3), and no one has argued that that section applies to any carrier other than that possessing the CPNI of the customer. MCI also "contrasts" Section 222(d)(2), which references "other carriers," with Section 222(d)(1), which has no such phrase, and thus argues that the latter has no limitations. But actually, the more reasonable construction of these provisions is quite the opposite. That is, Congress specifically intended "other carriers" to be the beneficiaries of Section 222(d)(2), but not of Section 222(d)(1), by omitting the same phrase used in one provision from the immediately preceding provision.

IV. THE "ELECTRONIC AUDIT" REQUIREMENT SHOULD BE ELIMINATED BECAUSE ITS COSTS FAR OUTWEIGH ANY BENEFITS.

From SBC's reading of the petitions, every commenter addressing the Commission's electronic audit requirement strenuously opposes it. It is not hard to see why. Over the course of the last two years, carriers have self-administered their own compliance with Section 222. While there have been skirmishes between carriers from time to time involving Section 222, to SBC's knowledge, there have been no substantial charges alleging a violation of the end-user customer statutory provisions of Section 222(c).

Despite these considerations, the Commission now hands the telecommunications industry a broad range of new CPNI compliance requirements involving exhausting customer notifications, software development, training measures, disciplinary reminders, supervisory review processes, corporate officer certifications, and electronic audit mechanisms. One is left to wonder what might have happened had Congress actually directed a rulemaking regarding CPNI.

It is becoming abundantly clear that literal compliance with the audit requirement would require electronic records to be established far beyond the marketing and sales context in which CPNI is most used -- all by latter January, 1999. These new electronic records would touch such extensive and transactions driven operations as: order processing, bill calculation and rendering, collections, credits and adjustments, traffic processing and reporting, trouble management and provisioning, financial forecasting and reporting, fraud control, call routing, message rating, database maintenance,[43] and other operations surfacing daily as knowledge of the electronic audit requirement becomes more widespread. In light of

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[43] AT&T, at 9; MCI, at 36.

the other safeguards established by the Commission, the electronic audit measures will provide minimal incremental benefit while imposing substantial costs, all without any explicit cost recovery mechanism having been established by the Commission.

In any case, now as before, there are no foolproof methods for ensuring compliance with CPNI rules. Yet, the Commission has never required such onerous restrictions for the sake of customer privacy and Congress certainly did not direct the FCC to do anything on CPNI, let alone adopt the electronic audit requirement in this instance.

V. THE PROHIBITION ON USE OF CPNI FOR WINBACK AND RETENTION PURPOSES REPRESENTS POOR PUBLIC POLICY AND RULE 64.2005(b)(3) SHOULD BE ELIMINATED IN ITS ENTIRETY.

To no one's surprise, an overwhelming consensus of commenters have once again emerged to attack Rule 64.2005(b)(3), the so-called "winback" prohibition.[44] SBC has briefed this point on several occasions,[45] and fully supports elimination of the prohibition on use of CPNI in winback efforts. Winback offers and counter-offers are pro-competitive, within the parameters of the customer-carrier total service relationship, and greatly benefit consumers. It is only through the use of the customer's CPNI in this context that "carriers are able to design

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[44]See, e.g., ALLTEL, at 8, AT&T, at 2, BellSouth, at 16, Omnipoint, at 18, PageNet, at 2, PrimeCo, at 10. While the text of the rule indicates that it is directed only to the circumstance in which a customer "has switched to another service provider," the Order suggests that the rule may apply even where a customer has not already switched providers, but has "undertaken steps" to do so. CPNI Order, ¶85. In the latter case, the use of CPNI by the existing carrier is regarded as furthering "retention" efforts. In either event, such use should be permitted, although for purposes of the present pleading, use of CPNI in either context shall be denominated as use for "winback" purposes.

[45]SBC, at 8; FNPRM Reply Comments of SBC Communications Inc., filed April 14, 1998 ("SBC FNPRM Reply Comments"), at 17; SBC's GTE Petition/CTIA Request Comments/Temporary Petition, at 21-25; SBC's GTE Petition/CTIA Request Reply Comments, at 4-5.

offers that meet the customer's needs and maximize the benefits of competition to the customer's advantage."[46]

These considerations support across-the-board relief for every carrier, whether wireless or wireline, ILEC or CLEC. As among all of these carriers, there is no reason to deny any one of them an opportunity to win its customers back and, as CTIA correctly observes, meaningful winback programs simply "do not work without access to a customer's CPNI."[47]

With particular respect to wireline ILECs, however, the Commission should not accept the red herring argument advanced by Frontier and MCI, to the effect that ILEC use of CPNI for winback or retention purposes should be barred as a violation of Section 222(b).[48] The premise of their arguments is that the ILEC would use "information derived solely from the provision of carrier-to-carrier services" or "information that [the ILEC] learns in the course of providing service to another carrier."[49]

These premises are utterly false. SBC takes no issue with the command of the statute that carriers may not use information about services rendered to another carrier who, in turn, resells such services to that carrier's end-user customer. However, SBC believes it and any other carrier is entitled to use CPNI reflecting the telecommunications service it has rendered to the end-user customer, with customer approval where necessary, without more. In this instance, Section 222(b) is not at all implicated, because no information of "another carrier"[50]

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[46]AT&T, at 4.

[47]CTIA, at 11.

[48]Frontier, at 9; MCI, at 50.

[49]Id., respectively.

[50]47 U.S.C. §222(b).